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Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland: Comments by the State

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the comments by the State on the report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland (23 to 27 October 2017) (A/HRC/38/38/Add.1).

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General Comments

The reforming of judiciary in Poland aims at streamlining the functioning of the justice system and responds to social expectations.

There is a dynamic dialogue with institutions, in particular with the European Commission. The dialogue has already brought some concrete results. Recently, amendments have been adopted that concern: common courts, the Supreme Court, National Council of Judiciary and the Constitutional Tribunal. Those amendments contain several provisions that positively respond to remarks made in the previous months by the European Commission and other international institutions. The amendments have introduced the following changes to:

(a) the Law on the common courts' system:

- amendment provides that the court presidents may not be dismissed from their posts solely by the decision of the Minister of Justice (MJ); a consent of the judicial community is also required. A two-stage procedure was introduced: if the Minister intends to dismiss a court president, first he needs to obtain a consent of the college of the court. If a consent is denied, the approval of the National Council for the Judiciary is necessary for a dismissal. If NCJ also does not agree (with a 2/3 majority – i.e. solely the votes of judges in the council are sufficient), the Minister is not allowed to dismiss the court president.

- passing the powers previously held by MJ to NCJ as regards the approval of continuation of judicial service after a judge has attained a general retirement age. The NCJ decides on the basis of criteria pre-established by law, i.e. interest of the judiciary, public interest.

- introducing a provision enabling earlier retirement for female judges, after attaining by them 60 years of age, regardless of the time period in employment in a position of a judge or a public prosecutor.

(b) the Act on the National Council of Judiciary:

- repealing of the provision governing the expiry of the NCJ mandate in case of appointment of a judge to another judicial position, except for an appointment of a district court judge to the position of a regional court judge, a military garrison court judge to the position of military circuit court or a voivodeship administrative court judge to the position of a Supreme Administrative Court judge,

- indicating the time within which the first meeting of NCJ should be held after vacating the position of the Council President within 30 days from the date of vacating the position – the session is summoned by the First President of the SC, within 14 days from the expiry of this time limit – the session is summoned by the eldest judge of the NCJ.

(c) the Act on the Supreme Court:

- setting the time limit for NCJ to deliver an opinion on further occupying of the position by a SC judge who will have attained the age entitling him to retire,

- setting the time limit for the President of Poland to give his approval for further occupying the position by the aforementioned judge of the SC and determining the consequences of a failure to give an approval within this time limit.

Referring to the provisions regulating the retirement of judges, it should be emphasised that judges, when retiring, maintain their status and acquire the right to receive decent remuneration. The right to retirement makes one of the guarantees of judicial independence, next to the guarantee of non-removability, thus statutory indication of the age of judges' retirement – earlier than before – does not prejudice the independence of courts, not being able to have an impact on judges resulting in them losing their quality of independence.

Pursuant to Article 69 of the Law on the common courts' system judges retire on the attainment of 65 years of age, unless they declare to the NCJ, not later than six months and not sooner than twelve months before the attainment of that age, that they are willing to further occupy the position and present a certificate of capability in terms of health to fulfil

duties of a judge. The NCJ may agree to further occupation of the position of a judge if this is justified by the interest of the justice system and significant social interest. The decision on further occupying of the office is taken by an independent body, comprising mostly judges, pursuant to objective criteria. The competence of the NCJ to approve further occupying of the position by a judge does not prejudice the principle of judges' and courts' independence, nor does it prejudice the principle of non-removability of judges.

Accordingly to the recently introduced amendments judges of the SC who wish to continue their service after reaching the standard retirement age (65 years, irrespective of gender), they are authorized to do so – if they declare such a will and obtain appropriate health certificate.

The judges could make such declaration before the First President of the SC – who then would issue its opinion whether they should continue and pass it on to the President of Poland. However, before deciding on prolongation, the President would be obliged to consult the NCJ.

The NCJ reaches an opinion on the basis of pre-established criteria – very similar to those for the common courts. The NCJ would take into account the interest of the judiciary, public interest, SC personnel needs and caseload in the particular chambers of the SC.

After the NCJ issues its opinion, the President may grant its consent within 3 months. The opinion must be taken into account.

As regards the procedure of appointing judges, it should be indicated that, also in this sphere the judiciary maintained considerable influence, with a certain involvement of the executive power. Pursuant to the wording of the Law on the common courts' system, judges of common courts are appointed to occupy their office by the President of Poland, on request of the NCJ, within one month from submitting this request. The NCJ is composed mostly of judges (17 of 25 members). They are selected by the Parliament, while candidates for NCJ members can be proposed by a group of 25 judges or by the group of 2000 citizens.

Executive power has no influence on the course of professional career of judges. Promotion takes place pursuant to the assessment of a visiting judge and opinions expressed by the court's board and general assembly of judges, which is a self-governing body, and by the NCJ.

As regards the provisions regarding the role of lay judges in the SC, in the Polish legal system, lay judges make the so-called social factor in the execution of the justice system, which stems from Article 182 of the Constitution of Poland. They take part in adjudicating along with professional judges. Their opinions in deliberations and votes are equally important as those of professional judges. It should be stressed that pursuant to the Law on the common courts' system, lay judges are independent in terms of adjudicating and they are only subject to the Constitution and statutes.

Moreover, Polish Government wants to stress that pursuant to the Act of 12 April 2018 amending the Act – Provisions introducing the Act on the organisation and procedure before the Constitutional Tribunal and the Act on the status of judges of the Constitutional Tribunal, the decisions of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016, as referred to in the report, will be published.

It is worth mentioning, that the Polish Government prepared *The White Paper on the reform of the Polish judiciary* in order to comprehensively present the rationale for the whole reform of the judiciary system undertaken in Poland. The aim of this document was to present in detail the essence of the reform of the judiciary to our international partners in order to expand their knowledge about the assumptions and solutions chosen to its implementation - https://www.premier.gov.pl/files/files/white_paper_en_full.pdf. We encourage to examine this document.

Specific Comments

II. Legal and institutional framework

B. The justice system

Para. 11.

The principle of the division and balance of powers - checks and balances - does not mean complete separation.

III. Challenges to an independent and impartial justice system

Para. 13.

The recalled quote from a private company report dealing with economic intelligence should not serve as a reference point for creating international standards. It cannot be the basis for any Polish obligations in the field of human rights.

Para. 15.

The quoted phrase comes from the publication of Mr. Waldemar Żurek, an active judge that became involved in a political dispute between the ruling party and the opposition parties, despite the constitutional prohibition of public activities incompatible with the principles of independence of courts and judges.

A. Judiciary under attack

The wording used lacks objectivity.

B. The constitutional crisis

Para. 21.

The problem started with unconstitutional appointments by the former Parliament that violated the Constitution and constitutional customs. Representatives of the currently ruling party called in June 2015 not to amend significant portions of law, but their calls were ignored.

Para. 23.

Including not 2 but all 5 positions that would become available only after general elections.

At the time the 7th Sejm was electing CT judges, there were no vacancies yet on the Tribunal. The President decided that the new Sejm would start its term on 12 November 2015, i.e. after the mandates of the 3 Tribunal judges had expired. Nevertheless under the law the President could have set an earlier date, which means that all 5 seats due to replacement would have been vacated during the 8th Sejm. The previous Sejm while making the appointment of judges on 8 October 2015 did not know when it would finish term.

Paras. 28. and 29.

Constitutional Tribunal judgments cannot be executed because their nature is not individual and specific. These judgments dealt with constitutionality of specific provisions of Act on CT.

Para. 30.

The Constitutional Tribunal's judgments will be published.

Para. 31.

The amendment was addressed to the Constitutional Court and did not impose any direct obligations for the citizens. Vacation legis would have no impact on the ability of an individual to adjust to the new legal order.

Para. 34.

A number of Tribunal's judgments were issued by panels that contravened the law applicable at the time, or based on repealed provisions. The judgments that had been issued against statutory provisions were published in order to address the irregularities that resulted from the unlawful delivery of judgments by the CT after 9/3/2016. In order to publish the defective rulings, the lawmaker had to adopt an appropriate and separate legal basis. The decision to publish defective judgments of CT stemmed from the need to limit the fallout of unlawful actions by CT.

Para. 39.

The aim of these acts was to restore the proper functioning of the Tribunal and to end the conflict around it. Key provisions of these acts entered into force with vacation legis.

Para. 40. c)

Reservations concerning the introduction of the option of earlier retirement for a Judge of CT are not well-founded as the decision regarding early retirement was exclusively for the judges to make.

Para. 41.

The election was consistent with art 194 of the Constitution, the applicable provisions of the Act on Organisation and proceedings before the CT, and the Act on the Status of Judges of the CT. Under the Constitution, candidates must be proposed by the General Assembly of the Judges of the CT, which was the case.

The appointment of a judge as Acting President of the Tribunal was prompted by the need to ensure that the Tribunal would function properly amid the ongoing political dispute stretching over many months. Today the Tribunal is presided over by a President, who was elected pursuant to the Constitution and statutes. All the Tribunal judges who were elected during the previous terms of the Sejm and whose mandates have not expired, continue to adjudicate, including within panels that comprise judges elected by the 8th Sejm.

C. The reform of the judicial system

Para. 48.

The Minister of Justice (MJ) exercises administrative supervision over courts. It does not intervene in court rulings. To ensure that MJ can effectively carry out its assigned tasks, it should have a real impact on the selection of managers at all levels of the administration of justice.

NC of the Judiciary does not deal with the administration of administrative activities of the courts, it should not have a decisive vote in entrusting managerial functions in the management structure, and only a consultative vote. Nevertheless, under recently introduced amendments the MJ is not allowed to dismiss the court president without obtaining a consent of the college of the court or NCJ.

The dismissal of the president, as the farthest-reaching measure, is provided only for the situation in which the lack of efficiency is evident, i.e. exceptional in comparison with the activities of other court presidents, who manage comparable units. In every case, the dismissal of the president and the vice-president of the court during the term of office, takes place after obligatory consulting the college of the court that would be affected by a dismissal. It should be noted that in case the college does not grant such consent, an approval of the National Council of the Judiciary is needed.

Dismissing a court president does not mean "removing a judge", as he remains an active judge.

Para. 49.

Presidents of the courts are the counterparts of middle and lower level managers. The function of the president of the court is not a higher position of judges and the appointment for such a position is not a professional promotion. The dismissal of the president and the vice-president of the court during the term of office, takes place after compulsory

consulting the college of the court. Nonetheless, in case the college of the court does not grant such consent, an approval of the National Council of the Judiciary is needed.

The president of the court decides in a judicial case as an ordinary judge, so he is independent in the exercise of his office and he is subject only to the Constitution and the laws.

Para. 51.

Accordingly to the recently introduced amendments the retirement age for male and female judges has been equalized. However, women retain privilege to an earlier retirement at the age of 60 – in accordance with the regulations for all other professions in Poland.

Para. 52.

The right to an extension of the working period for a judge is a specific privilege, according to which the judge can be professionally active up to the age of 70. It should be stressed that the competence to prolong judicial mandate was granted solely to the judiciary: it will be the NCJ that decides, without any presence of the government or the President in the process. Furthermore, the NCJ decides on the basis of criteria pre-established by law, i.e. interest of the judiciary, public interest, personnel need of common courts and their caseload.

Para. 55.

The law adjusts the solutions regarding the retirement age of the Supreme Court judges to the new general pension scheme and rules for ordinary judges. On retirement, a judge retains the status of a judge and acquires entitlement to a decent salary. The right to retire is one of the guarantees of judges' independence, in addition to the statutory guarantee of irremovability.

Para. 56 and 58.

It should be stated that the appointment of a judge to an office is left to the power of the President of Poland, who appoint a judge on application of the NCJ. The President also receives the power to decide on the possibility for a judge who has attained the retirement age to administer justice throughout additional time.

The Constitution of Poland determines that: "The First President of SC shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court". Therefore, the required number of candidates needs to provide the President with a genuine choice.

SC Act does not provide for a permanent competence for the President to appoint the First President of the Supreme Court and the Presidents of Chambers of SC in the event of a vacancy in those positions.

This provision has a temporary and one-time nature, since in view of the establishment of two new Chambers of the Supreme Court and the increase in the number of judges' posts, the author of the proposal links the election of the new First President of SC and the Presidents of Chambers of SC to the filling of a number of these posts.

Para. 59.

The adopted regulation fits within the boundaries of the legislator's right to establish laws in accordance with state policy, in this case laws concerning the judiciary.

Para. 61.

The introduction of lay judges to adjudicate in SC is not contrary to the provisions of the Polish Constitution.

The essence of this solution is to introduce a non-professional agent to professional panels, so that attention can be drawn to aspects significant in terms of social justice, which may be unrecognised by professional judges who often consider cases routinely.

Para. 62.

The Extraordinary Chamber will take over the powers held by the Labor Law, Social Security and Public Affairs Chamber with regard to politically sensitives cases. New power to review any final and judgment issued by Polish courts in the last twenty years is related to criticism of unfair verdicts of the Polish courts. The judiciary itself has recognized the need for such a mechanism.

The Disciplinary Chamber will be given special status what results from the nature of disciplinary proceedings that need to provide the judges ruling in such cases with a particular assurance of their independence. Appointing the Disciplinary Chamber in the Supreme Court was also specified in the draft act on the Supreme Court presented by the First President of the SC.

Para. 68.

15 judicial members of the Council who are elected by the Sejm have the guarantees of their independence. Taking into account a current legal system, similar allegations could be made against the method of election of judges of the Constitutional Court, the Ombudsman or the President of the Supreme Chamber of Control.

There is no provision which would introduce the principle of subordination of the members of the National Council of the Judiciary to any other body, in particular the Parliament.

Para. 69.

The Constitution of Poland clearly states that "a statute shall specify the scope of participation by the citizenry in the administration of justice". Specifying the scope of citizen participation in the administration of justice was thus left to the legislator. The legislator also has the right to choose the model under which such participation will take place. In this case, the legislator has also granted the citizens the right to propose candidates to NCJ from amongst the judges, in order to give the citizens greater control over the composition of the judicial corps.

Para. 70.

A new, common mandate for those members of the Council who are chosen from judges is stipulated in order to ensure compliance between the provisions of the Act on NCJ with the Polish Constitution. It is necessary to recourse to an exceptional solution which is actual reduction of the term of office of those members.

The applicability of such solution is confirmed by the Constitutional Court judgment of 18/7/2007, in which the Constitutional Court declared as unconstitutional the existing provisions on the election of judges - members of the Council.